

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

**(202) 565-5330
(202) 565-5325 (FAX)**



DATE: May 15, 2000
CASE NO.: 2000 - INA - 83

In the Matter of:
POTOMAC PIZZA,
Employer,

on behalf of

SANTOS VALENCIA,
Alien.

Appearance: Luis F. Salgado, Esq.
Washington, D.C.

Certifying Officer: Richard Panati
Philadelphia, PA

Before: Holmes, Vittone, and Wood

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of Alien Santos Valencia ("Alien") filed by Employer Potomac Pizza ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. § 656. The Certifying Officer ("CO") of the United States Department of Labor, Philadelphia, Pennsylvania, denied the application, and the Employer and the Alien requested review pursuant to 20 C.F.R. § 656.26.

Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that 1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor, and 2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly

employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. § 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written argument of the parties. 20 C.F.R. § 656.27(c). All parties were served with a Notice of Docketing and Order Requiring Statement of Position or Legal Brief on January 12, 2000; they were notified that all parties had twenty-one (21) days to submit a statement or brief, and such was required if a grounds of appeal was not stated in the request for review by the Board of Alien Labor Certification Appeals (the "Board").

Statement of the Case

On December 20, 1997, Employer filed an application for alien labor certification to allow it to fill the position of "Specialty Cook, Italian" in its Potomac, Maryland restaurant. After amendment, the position was described as:

"Plans, menus and cooks Italian-Styles dishes, dinners, desserts, and other foods according to recipes. Prepares meats, soups, sauces, vegetables and other foods prior cooking. Seasons and cooks food according to prescribed methods. Portions and garnishes food. Serves food to waiters on order. Estimates food consumption and requisitions and purchase supplies."

A forty hour work week, with overtime as needed, was provided for, and would be compensated at the rate of \$11.47 per hour. Overtime would be paid time and a half. Two years of experience in the offered job or the related occupation of Cook's Helper were required. As special requirements, the Employer listed good work references, no smoking or drinking on the job, general safety knowledge, and availability for overtime, weekends, and holidays. (AF 23).

Employer advertised and posted the position in accordance with applicable law. Only one application was received; despite numerous attempts at telephone contact and the sending of a certified letter, the applicant did not respond. (AF 20).

A Notice of Findings ("NOF") was issued on April 26, 1999 proposing to deny the application on the basis of inclusion of unduly restrictive requirements in violation of 20 C.F.R. § 656.21(b)(2). Specifically, the CO found that, based upon a review of the Employer's menu, position description, and the Dictionary of Occupational Titles ("DOT") definitions of the jobs,

the position was more accurately categorized with “Cook, Specialty,” “Baker, Pizza,” and “Sandwich Maker,” all of which had lower Specific Vocational Preparation (“SVP”) designations than “Cook, Specialty, Foreign Food” which Employer had filed under. The two year experience requirement was therefore in excess of what the DOT called for, and was deemed unduly restrictive. To rebut this finding, Employer was invited to reduce the requirements to the DOT standards, or to establish a business necessity for the higher qualifications. To establish business necessity, Employer was directed to show that the requirement bears a reasonable relationship to the position and is essential to the reasonable performance of the job duties. (AF 16-18).

A Rebuttal was filed on July 1, 1999, after Employer requested and was granted an extension of time. (AF 14, 15). This consisted of a three page letter from counsel disputing the reclassification of the position, a one page letter from Employer detailing the extent of the menu and job duties, and a copy of a menu. Employer maintained that the extent of the menu, the reputation of the 21 year old business, and the job duties described on Form 750-A all required classifying the job at the higher SVP. (AF 8-13).

A Final Determination (“FD”) denying the certification was issued on July 23, 1999. The CO cited the unduly restrictive SVP as grounds. The Rebuttal was found to show that the menu of Employer consisted mainly of pizza and sandwiches, and the dinners were “standard fare in American cuisine and cooking.” Further, the items which Employer states are produced from scratch and would necessitate a higher degree of skill are prepared routinely by Employer, in the same manner each time. No special skill is required to follow the recipes or reproduce the food. The menu is set, and the items could all be quickly and simply prepared. (AF 6-7).

A Motion for Reconsideration was filed on August 19, 1999. The Employer maintained that the findings of the CO and his assertions regarding the job duties of the Cook were directly contradictory to the Employer’s statements, and that there was no basis in the record to disbelieve the Employer. Employer also argued that the CO had raised a new issue in the FD by referring to a “more highly skilled cook” and the skills of such a position in relation to the Employer’s offered job. Additionally, because the CO did not provide a DOT number for the “more highly skilled cook,” Employer was denied the opportunity to properly respond to the deficiency. (AF 4-5).

Reconsideration was denied on October 1, 1999, as the CO found the request dealt solely with matters which could have been addressed in Rebuttal. (AF 3). Employer then requested administrative review of the denial by letter of October 19, 1999 based upon the misclassification of the position by the CO. The position was not, as the CO had found, a generic cook, but instead was a Cook, Foreign Specialty, requiring a higher experience level. (AF 1-2).

On February 2, 2000, Employer filed a position statement summarizing its legal arguments.

Discussion

We agree with the CO that the two year experience requirement is unduly restrictive. The position offered by the Employer, based upon the menu submitted and the description of the business presented by Employer, does not require the greater skills of a cook specializing in foreign foods. While Employer's business may not be a "local pizza dive," it also has a set and fairly limited menu. The quality of the food may very well be excellent, but the nature of the items prepared are not so complex as to require two years of experience in preparing them. We find that the menu leans heavily toward pizza and sandwiches. The "specialty" dishes are not uncommon, and are in fact "standard fare in American cuisine and cooking," such as lasagna, pastas, and parmigiana dishes.

Employer argues that because the CO did not dispute the duties stated on Form 750-A, those duties must be used as the basis for classifying the job. Because they encompass the duties of the more skilled "Cook, Foreign Specialty" and differ from "Cook, Specialty," the Employer maintains that the actual duties of the job should not be examined. Further, the Employer maintains that the description on Form 750-A is a listing of the actual duties of the cook, and that the Rebuttal letter of Employer corroborates that the cook does indeed "prepare soups, salads, gravies, desserts, sauces and casseroles" and does "bake, roast, broil, and steam meats, fish and vegetables."

First, the DOT is merely a guideline and should not be applied mechanically. Promex Corporation, 1989-INA-331 (Sept. 12, 1990). We note that the job description given by Employer is taken verbatim from the DOT. It is counterintuitive to mechanically apply the job description merely because it has been copied from the DOT to the Form 750-A. The CO properly looked at the actual duties of the cook in determining the propriety of the stated experience requirement. The CO considered three different jobs and their included duties in determining that the Employer had included an unduly restrictive requirement.

Second, upon examination of the actual duties of the cook, based upon the submitted menu and the description provided by Employer in Rebuttal, we find that the CO properly found that the position did not come close enough to the more highly skilled foreign specialty position. As has been noted, the listed dishes are set, and can be prepared from established recipes. Further, they have become almost as American as apple pie is considered to be. Moreover, contrary to the contentions of Employer, the Rebuttal does not establish that the actual duties performed require more skill. Lasagna, meatballs, dough, and two tomato sauces are apparently prepared from scratch, but no other products are listed. We note that these are not especially complex products, even if they are "fantastic." As the CO pointed out, and the Employer admits, they are prepared frequently, "every few days" at least, and therefore lend themselves to reduction to recipes. No special skill is required to follow a recipe, especially one which has been proven over 21 years.

We agree with the CO, and find that Employer has failed to meet the burden of proof imposed by 20 C.F.R. § 656.2(b). It has not been shown that the actual job duties performed by the cook in the Employer's business require the greater experience required by the Employer.

The violation of 20 C.F.R. § 656.21(b)(2) has not been corrected.

Order

Therefore, the Final Determination of the Certifying Officer is affirmed, and labor certification is denied.

For the Panel:

John C. Holmes
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure and maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon granting of the petition the Board may order briefs.